LYL HOOKER SDN. BHD.

v.

TEVANAIGAM SAVISTHRI K.T. CHITTY & ANOR.

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
SYED AGIL BARAKBAH SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 154 OF 1985]
16 MAY 1986

CONTRACT: *Assignment of sale and purchase agreement - Consent of appellant company required - Whether deed a novation or an assignment.*

This was an appeal from the decision of Harun J. On 10 May 1977, the appellant company, a housing developer, signed a sale and purchase agreement with one Yeo Tiang Chin who purchased a unit of double-storey house. Vacant possession was to be delivered not later than 18 months thereafter and that no assignment is permitted without the consent of the appellant company.

On 29 November 1978 Yeo Tiang Chin executed a deed of assignment transferring all his "rights title interest and liabilities" under the sale and purchase agreement to the respondents for a consideration of RM12,200. The appellant company consented to the assignment. Vacant possession was given on or about 30 April 1980 and because of the delay the respondents sued for compensation.

The appellant company maintained that the 18 month period within which vacant possession should be delivered should commence not from the date of the sale and purchase agreement but from the date of assignment (29 November 1978), hence there is no delay and no compensation payable. Counsel for the appellant company submitted that the deed is not in law an assignment but a new contract; firstly, because the appellant company consented to the assignment and therefore it became a novation;and secondly, as at law assignment is not permissible to the transfer of liability, the deed must therefore be a novation.

Held:

[1] Consent was required because Clause 22 of the sale and purchase agreement insists that for an assignment to be valid, consent of the appellant company is required and that consent does not render the deed any less than an assignment which is what the parties in tended. Consent operates no more than a legal recognition by the appellant company of the validity of the transfer of rights from the assignor to the respondents and that consent binds them.

[2] In the deed of assignment what was transferred was not liability but the right to have vacant possession of the house delivered within 18 months from the date of the sale and purchase agreement to the respondents.

[3] In order for the deed to amount to a novation there must be consideration moving between the appellant company and the respondents.

[4] Novation is a new contract. It extinguishes rights and obligations under the old contract for which the new contract is made. Being a new contract, there must be consent by all parties and there must be consideration, and rights and obligations under it are not those transferred from the old contract which is already extinguished.

[5] There was no extinguishment of rights and obligations under the sale and purchase agreement and there was no consideration moving between the appellant company and the respondents. Therefore there was no novation. The deed of assignment dated 29 November 1978 was an assignment.

[Appeal dismissed with costs.]

Other sources referred to:
Chitty on Contract, Vol. 1, 1983 Edn., para. 1315, 1316

For the appellant - John Fam of M/s. A.K. Lee & Co.
For the respondents - Victoria Y.K. Ng of M/s. Y.K. Ng & Co.

JUDGMENT

Salleh Abas LP:

This appeal originated from the decision of Magistrate, Kuala Lumpur, which Harun J reversed. He then gave leave to appeal to us. Neither the Magistrate who has since left the service nor the Judge has given any grounds for their decisions.

The facts are straight forward. The appellant company are a housing developer. On 10 May 1977 they signed a sale and purchase agreement with one Yeo Tiang Chin who purchased a unit of double-storey link house, then under construction. Clause 6 of the agreement stipulates that the appellant company must complete the house and deliver vacant possession not later than 18 months thereafter, i.e. on or about 9 November 1978, and under Clause 22 no assignment is permitted without the consent of the appellant company.

On 29 November 1978 Yeo Tiang Chin executed a deed of assignment transferring all his "rights title interest and liabilities" under the sale and purchase agreement to the respondents for a consideration of RM12,200. The assignment was consented to by the appellant company. At the time of the execution of the deed the house was still under construction and it was not until on or about 30 April 1980 that it was completed and vacant possession delivered. Because of this delay the respondents sued the appellant company for compensation under cl. 6 of the agreement.

Throughout the proceedings before the Courts below and before us the appellant company maintained that the 18 month period within which vacant possession should be delivered to the respondents should commence not from the date of the sale and purchase agreement but from the date of assignment (29 November 1978) and that since vacant possession was delivered on 30 April 1980 which is well within the 18 month period, there was therefore no delay as such no compensation under Clause 6 is payable. Counsel for the appellant company submitted that the deed despite its description is not in law an assignment but a new contract (novation). Two reasons were advanced for this proposition. First, because the appellant company consented to the assignment the assignment therefore became a novation. Secondly, as at law assignment is not permissible to the transfer of liability, the deed must therefore be a novation.

As regards the first objection, consent was required in this case because Clause 22 of the sale and purchase agreement insists that for an assignment to be valid consent of the appellant company is required. In our view, that consent does not render the deed any less than an assignment which is what the parties intended. Consent operates no more than a legal recognition by the appellant company of the validity of the transfer of rights from the assignor (Yeo Tiang Chin) to the respondents and that consent binds them.

Referring to the second objection, there seems to be a confused thinking here. What was transferred from the assignor to the respondents in so far as the matter in issue is concerned, was not liability but a right to have vacant possession of the house delivered within eighteen months from the date of the sale and purchase agreement. The appellant company's liability to deliver vacant possession within that period remained with the appellant company and was not transferred to any one else, though in the discharge of this obligation it has to deliver it to the respondents instead of to the assignor (the original purchaser). This is what the assignment is all about. Moreover, for the deed to amount to a novation, the appellant company must show that there was consideration moving between them and the respondents. Hence they fail to do so.

Novation is a new contract. It extinguishes rights and obligations under the old contract for which the new contract is made. Being a new contract, there must be consent by all parties and there must be consideration, and rights and obligations under it are not those transferred from the old contract which is already extinguished. (see *Chitty on Contract*, Vol. 1, 1983 Edn. at para. 1315 and 1316).

Looking at the deed we fail to find anything which suggests extinguishment of rights and obligations under the sale and purchase agreement. There is nothing either to show any consideration moving between the appellant company and the respondents, which is a vital requirement for a novation.

We therefore hold that the deed of assignment dated 29 November 1978 was an assignment. This appeal is dismissed with costs. We order that the appeal deposit be paid to the respondents towards taxed costs.

Also found at [1987] 1 CLJ 356